Supreme Court, U.S.
FILED

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No.

In the
Supreme Court of the United States

MARITIMA MEXICANAS SA DE CV,
also known as, MarMex,

Petitioner,

v.

PERFORACIONES EXPLORACION Y PRODUCCION,
also known as, Protexa; CERTAIN REINSURING
UNDERWRITERS, Subscribing to Reinsurance Contract
No. AHE-030044 as Amended to No. AHE-04004,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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May 14, 2010

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QUESTIONS PRESENTED FOR REVIEW

I. The Fifth Circuit Has Expanded Admiralty Subject Matter Jurisdiction of the Federal Courts Worldwide to Collisions Between Foreign Vessels in Foreign Waters That Involve No Discernible Interests of the United States or its Citizens, Beyond the Grant of the United States Constitution or Any Precedent of this Court.

II. Alternatively, the Fifth Circuit Has Misapplied the Doctrine of Forum non Conveniens to Permit a Case with No Connection to the United States to Be Tried in a United States District Court, and Has Departed So Far from the Accepted Course of Resolving Forum non Conveniens Cases, That Supervisory Authority Should Be Granted by this Court.

PARTIES TO THE PROCEEDING

1. Maritimas Mexicananas, S.A. de C.V. a/k/a MarMex

2. Perforaciones Exploracion Y Produccion, a/k/a Protexa

3. Grupo TMM, S.A. de C.V.

4. Navigators Insurance Services of Texas, Inc.

5. Commonwealth Insurance Company

6. New York Marine & General Insurance Company

7. ARCH Insurance Group

8. St. Paul Fire and Marine Insurance Company

9. Hannover Re

10. Axis Re Limited

11. ACE INA UK Limited

12. Compagnie de Reassurance d'Ile France

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 14.1(b) and 29.6, and to enable justices of the Court to evaluate possible disqualification or recusal, petitioner — Maritima Mexicanas, S.A. de C.V., certifies that the following are all of the corporate parents and other publicly held companies owning 10% or more of the petitioner's stock at the time of the allision in question:

Seacor Maritima Mexico, Inc.

Transportes Maritimas Mexico, S.A. de C.V.

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Order of the Fifth Circuit Denying Petition for Rehearing en banc issued February 17, 2010 in Case No. 08-41021. Opinion of the Fifth Circuit on Appeal from the United States District Court for the Southern District of Texas, USDC No. 05-cv-419, issued December 9, 2009 in Case No. 08-41021.

Findings of Fact and Conclusions of Law in the United States District Court for the Southern District of Texas, issued September 2, 2008 in Case No. 05-cv-419. DN 297; 2S 5513-5529[1].

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Order on Defendants' Motions to Dismiss in the United States District Court for the Southern District of Texas, issued July 21, 2006 in Case No. 05-cv-419. DN 67; OV 2010-2027.

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STATEMENT OF THE BASIS FOR JURISDICTION

Jurisdiction of the underlying action and the appeal to the Fifth Circuit was premised upon 28 U.S.C. § 1333 and Fed. R. Civ. P. 9(h), since this is a claim for damages arising from a maritime collision between two vessels. Defendant MarMex appealed to the Fifth Circuit on October 1, 2008 from a final interlocutory judgment finding liability by the district court, pursuant to both 28 U.S.C. § 1292(b) and 28 U.S.C. § 1292(a)(3). The Fifth Circuit accepted the appeal pursuant to the latter statute as an appeal from an interlocutory order determining the rights and liabilities of the parties to admiralty cases.

The three judge panel of the Fifth Circuit entered a judgment affirming the decision of the trial court on December 9, 2009. Thereafter, on December 22, 2009, a Petition for Rehearing En Banc was filed with the Fifth Circuit, within the fifteen day timeframe for seeking such relief. The original panel, observing that no en banc polling had been requested, issued a ruling on February 17, 2010 denying the petition for rehearing.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 to consider petitions for certiorari from final judgments of courts of appeal.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. art. 3, § 2

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution,

> the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--*to all cases of admiralty and maritime jurisdiction;*--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

STATEMENT OF THE CASE

Facts

On March 31, 2004, the M/V ISLA AZTECA, a Mexican-flagged supply vessel, collided with another Mexican-flagged vessel, the Mobile Operating Drilling Unit ("MODU") TOTONACA in Mexico's Bay of Campeche, an area indisputably within Mexico's Exclusive Economic Zone.[2] Petitioner, Maritimas Mexicanas, S.A. de C.V. ("MarMex") owned and operated the ISLA AZTECA. Respondent Perforaciones Maritimas Mexicanas ("Protexa") owned the TOTONACA, a jack up rig which was on station and jacked down when the allision occurred.[3] Both MarMex and Protexa are and were incorporated solely in Mexico, with headquarters, offices, and business

[2] 2S 5519; App. 29a.

[3] 2S 5519; App. 29a.

operations in Mexico.[4] At the time of the collision, the crews of both vessels were Mexican nationals.[5] The contract under which the TOTONACA was being used to drill for oil was between Protexa and PEMEX (the Mexican national oil company). MarMex was working under a separate contract with PEMEX.[6] Both of these contracts with PEMEX contained Mexican choice of law and forum selection clauses.[7] Following the allision, both the ISLA AZTECA and the TOTONACA were repaired in Mexico.[8]

On May 6, 2004, MarMex filed a petition to limit its liability in Mexico, as it was entitled to do under the law of its country. The Limitation Action remains pending and funded in Mexico, thereby providing Protexa with an adequate forum to seek redress of its claims arising from the collision, by filing a claim in the action pending in its own country. On May 17, 2004, Protexa also availed itself of Mexican jurisdiction by filing a Querella against MarMex, in order to obtain monetary damages in excess of the Limitation fund if it succeeded.[9]

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[4] 2S 5513; App. 19a.

[5] 1S 1325.

[6] 1S 4285, at 13-19; App. 137a.

[7] 1S 1605, 1S 4285 at 13-19; App. 138a.

[8] 1S 2614-18

[9] 1S 2703; App 57a.

Procedural History in United States

On July 28, 2005, Perforaciones Exploracion y Produccion ("PEP")sued MarMex, Seacor Holding, Inc. and Grupo TMM, S.A. de C.V. ("TMM") in the United States District Court for the Southern District of Texas, Galveston Division, Judge Samuel Kent presiding. Seacor, an American corporation, was sued on the basis that it owned 40% of MarMex. This allegation was in fact shown to be incorrect, and led to Seacor being dismissed from the action. On July 14, 2006, after it was clear that PEP had no ownership or proprietary interest in the TOTONACA, the district court permitted a substitution of parties so that PMM ("Protexa") would become the party plaintiff, to avoid dismissal on the basis of *Robins Dry Dock*.[10] That same month, Seacor was dismissed from the case, leaving the two Mexican entities, MarMex and Grupo TMM (the parent company of MarMex), as the remaining defendants.

On July 21, 2006, Judge Kent denied the Motion to Dismiss for lack of subject matter jurisdiction, *forum non conveniens*, and principles of international comity filed by MarMex and Grupo TMM.[11] The two defendants filed an interlocutory appeal of that ruling to the Fifth Circuit, which appeal was dismissed in November, 2006, on a finding by the Court of Appeal that the order appealed from did not determine the

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[10] *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927); OV 1866; App. 90a; OV 2084, at 3-2090, at 13; App. 126a-133a.

[11] OV 2026; App. 88a.

parties' substantive rights and liabilities, and was therefore, premature.[12]

In May, 2007, Judge Kent ordered that Mexican law should be applied to the case and that Article 1913 of the Mexican Civil Code[13] was applicable as Mexican substantive law, but that the Limitation Statute of Mexico[14] was not substantive and therefore would not be applied.[15]

In October, 2007, the case was reassigned to Judge Ellison in the Southern District of Texas, Houston Division.[16] MarMex and TMM filed motions to reconsider the motion to dismiss as well as the refusal to apply the Mexican Limitation Statute.[17] Judge Ellison declined to reconsider the *forum non conveniens* and international comity issues, but stated that "Given the facts of this case, this Court likely

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[12] *Perforaciones Exploracion y Produccion v. Grupo TMM, S.A. de C.V.*, 207 Fed. App'x 458 (5th Cir.); 1S 407; App. 92a and 96a-97a.

[13] Codigo Civil Federal [C.C.F.] [Federal Civil Code], Articulo 1913 (Mex.) Article 1913 of the Mexican Civil Code.

[14] Codigo Civil Federal [C.C.F.] [Federal Civil Code], Convenio Sobre Limitacion de la Responsibilidad Nacida de Reclamaciones de Derecho Maritimo, 1976 (Mex.) - Limitation Statute of Mexico.

[15] 1S 718-19; App. 116a.

[16] 1S 24; App. 135a.

[17] 1S 1324-1659; 1S 2652-64; 1S 2670-73; 1S 2699-2701; 1S 3177-3201; 1S 3221-25; 1S 1319-23; 1S 2112-17; 1S 2821-91; 1S 3131-54; 1S 3155-69; 1S 3170-76.

would have reached a different conclusion if it had been considering Defendant's motion to dismiss eighteen months ago."[18] With respect to the issue of subject matter jurisdiction, Judge Ellison stated "The Court is not aware of a case that addresses the precise fact scenario present in this case; namely, an *in personam* involving an allision between two vessels operating under the flag of the same country that occurred in the country's Exclusive Economic Zone. In the absence of clearly controlling precedent to the contrary, however, the Court cannot find that the decision to deny Defendants' motion to dismiss constituted a manifest error of law."[19]

In April, 2008, Judge Ellison bifurcated the trial of liability and damages, noting that "Among other things, bifurcation will allow the Fifth Circuit to decide with finality any questions regarding the exercise of jurisdiction over Defendants and the Court's interpretation and application of Mexican law."[20] After some stipulations with respect to the cause of the allision, on May 5-6, 2008, the case proceeded to trial on two issues: (1) whether TMM was a "user" of the ISLA AZTECA who could be held liable pursuant to Article 1913 of the Mexican Civil Code and (2) whether damage to the TOTONACA's spud cans was causally related to the allision.[21] The trial court

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[18] 1S 2709; App. 65a.

[19] 1S 2708-2709; App. 65a.

[20] 1S 3301-3302; App 118a-119a

[21] 2S 5514; App. 20a.

found that TMM was not a user, and, a take-nothing judgment was rendered in its favor. It also found that the damage to the TOTONACA's spud cans was not causally related to the allision.[22] No trial on damages has been set.

On October 1, 2008, MarMex filed an appeal pursuant to 28 U.S.C. § 1292(a)(3) on the following issues: 1) the absence of subject matter jurisdiction; 2) the abuse of discretion by the District Court in failing to dismiss the case based on *forum non conveniens*; 3) the abuse of discretion in failing to dismiss the case based on principles of international comity; and 4) the District Court's legal error in treating the Mexican Limitation Statute as procedural instead of substantive.

On December 9, 2009, a three judge panel of the United States Fifth Circuit Court of Appeals issued a per curiam ruling affirming the rulings of the District Court on the Motion to Dismiss and the ruling that the Mexican Limitation Statute was procedural. MarMex filed a Petition for Rehearing En Banc on December 22, 2009. On February 17, 2010, the original three-judge panel issued another per curiam ruling, denying the petition for rehearing.

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[22] 2S 5528-29; App. 52a-54a.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Has Expanded Admiralty Subject Matter Jurisdiction of the Federal Courts Worldwide to Collisions Between Foreign Vessels in Foreign Waters that Involve No Discernible Interests of the United States or its Citizens, Beyond The Grant of the United States Constitution or Any Precedent of This Court.

The facts of this case present an opportunity for this Court to draw a bright line as to the scope of subject matter jurisdiction in admiralty and maritime cases. While that line, as both district judges noted, has not always been well defined, it has never been extended by this Court or any other circuit to this extreme. Simply, the decision of the Fifth Circuit breaks new ground in an area where national uniformity is paramount. If a court is going to opine, as the Fifth Circuit has now done, that the constitutional grant of subject matter jurisdiction over admiralty cases extends to collisions in foreign waters, between foreign vessels owned by foreign entities, with no identifiable United States interest, that court should be the Supreme Court of the United States. This is particularly true where there has been no recent expression by this Court and the Fifth Circuit has relied upon an 1885 decision of this Court and a handful of its own decisions, all of which are distinguishable, and all of which depend upon facts where a United States interest is identified.

The issue of subject matter jurisdiction over foreign maritime controversies implicates not only issues of the extent of sovereign interests, but the policy reasons for why the sovereign power should be so extended or

limited. If the constitutional grant of admiralty and maritime subject matter jurisdiction is unlimited, then the *only* restraint on foreign entities flocking to United States courts for the resolution of purely foreign controversies will be the doctrine of *forum non conveniens*. As will be shown in the second part of the argument below, this doctrine is a far from adequate gatekeeper, particularly when its criteria are not applied properly by individual district courts and the standard of review dissuades courts of appeal from correcting results which are in all respects flawed.

It is submitted that the acknowledgement of some limits or parameters on the admiralty subject matter jurisdiction of the federal courts, besides simply the fact that the cause arose on navigable water or bore a relationship to traditional maritime activity, is consistent with notions of national sovereignty and the defined interests of the United States, for which that original grant of jurisdiction was posited in the first place.

The basis for subject matter jurisdiction over admiralty and maritime claims is found initially in Article 3, Section 2 of the Constitution. There, the judicial power is extended to "all cases of admiralty and maritime jurisdiction." In determining the boundaries of admiralty jurisdiction, this Court has historically "looked to the purposes of the grant."[23] That fundamental purpose or interest has been defined

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[23] *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991), *citing, Ins. Co. v. Dunham*, 78 U.S. (1871).

by this Court as "the protection of maritime commerce."[24]

It begs the question how the extension of admiralty jurisdiction to the waters of foreign countries protects maritime commerce, either in the United States or in the foreign country, when no discernible United States interest or interest of its citizens is involved, and the only result is to make rulings of a local nature of citizens of that foreign, sovereign nation, applying the local maritime laws of that nation. No international interest is being served. Rather, it is simply an act of a larger nation imposing its hegemony upon the smaller nation under the pretext of some larger, international interest which palpably does not exist.

This court has noted in the past that:

> Subject matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject matter delineations must be policed by the courts on their own initiative even at the highest level.[25]

The question posed herein is whether or not any subject matter limitations exist upon admiralty jurisdiction. The facts of this case present a circumstance where no identifiable United States

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[24] *Sisson v Ruby*, 497 U.S. 358, 367 (1990), *quoting Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982).

[25] *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999).

interests exist, either in the form of the parties involved or in the existence of more abstract United States policy interests. The collision between two Mexican-flagged vessels, owned and operated by entirely Mexican corporations, in Mexican waters, crewed by Mexican nationals, while both vessels were working under contract for the Mexican national oil company, is an event entirely free from U.S. involvement. The litigants are not U.S. corporations. The applicable law will be the law of the Republic of Mexico, over which the United States court has no overriding interest. The fact pattern is so devoid of any United States relationship that District Judge Ellison frankly admitted that he could find no case law support for extending the jurisdiction of the American courts to such a cause.

The Fifth Circuit, by contrast, assumed the existence of jurisdiction worldwide, so long as the case involved a maritime locality. This global reach of subject matter jurisdiction was found, not in the existing case law, but in a treatise.[26] Specifically, the Fifth Circuit held that the subject matter jurisdiction in admiralty cases "potentially extends to the four corners of the globe, to the high seas and even foreign territorial waters."[27] While in certain instances this may be correct, insofar as there is an identifiable interest of the United States which justifies such an extension, the Fifth Circuit goes farther and states

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[26] *See* p. 2 of the February 17, 2010 opinion denying rehearing, *citing* 2 Thomas J. Schoenbaum, *Admiralty & Mar. Law* § 14-9 (4th ed. 2004).

[27] *Id*

that "When cases concerning maritime collisions only have attenuated links to the United States, the question is not whether subject matter jurisdiction exists, but rather whether courts should abstain from exercising jurisdiction."[28] In other words, the *only* constraint on the exercise of admiralty subject matter jurisdiction is what is now known as the *forum non conveniens* analysis.

The existing case law in this Court has never reached the precise issue posed; namely, whether admiralty subject matter jurisdiction can exist in the absence of *any* interest of the United States or its citizens. A review of the rulings by this Court over the years shows that admiralty jurisdiction has been extended to vessel collisions on the high seas, as well as in the territorial waters of foreign nations. In each of those instances, however, some relationship existed with the United States which would support the assertion of subject matter jurisdiction. In *Pan. R.R. Co.*,[29] this Court found that a tort occurring within the waters of a foreign country may be subject to U.S. admiralty jurisdiction. However, that case involved an American defendant who owned the pier in Panama where the plaintiff vessel sank. Thus, there was an identifiable American interest in the maritime controversy. Likewise, in *Malay. Int'l Shipping Corp.*,[30] the Third Circuit found that admiralty

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[28] *Id.*

[29] *Pan. R.R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 285 (1897).

[30] *Malay. Int'l Shipping Corp. v. Sinochem Int'l Co.*, 436 F.3d 349, 355–56 (3d Cir. 2006), *rev'd on other grounds*, 549 U.S. 422 (2007).

jurisdiction existed when a vessel was seized in a Chinese port. Again, this case involved a shipment of steel coils from the U.S. to China, from a U.S. company, under a U.S. bill of lading.

In addition to citing *Napier* and *Sinochem*, the Fifth Circuit cited *Exxon Corp.*,[31] where it had found subject matter jurisdiction over a tort involving a Singapore plaintiff against an American company defendant who was doing business in foreign waters; and *Coats*,[32] which concerned a Mississippi employee of Penrod working in the United Arab Emirates. Apart from the fact that U.S. interests were involved, the real issue in that case was simply whether the injured worker was subject to maritime law rather than state law; hardly an apt comparison. Nonetheless, in both cases cited by the Fifth Circuit, American interests of some sort were present to justify the extension of subject matter jurisdiction to the waters of a foreign nation.

The Fifth Circuit, when confronted with the frailty of its position on application for rehearing, ultimately cited *The Belgenland*,[33] as authority for the unlimited scope of admiralty subject matter jurisdiction hypothesized by Professor Schoenbaum. That case involved a collision between a Belgian and Norwegian

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[31] *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 311 (5th Cir. 1987).

[32] *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1117 (5th Cir. 1995).

[33] *The Belgenland*, 114 U.S. 355 (1885).

vessel in the mid-Atlantic, when one of the vessels was on a voyage to the United States. After the Norwegian vessel sank, the crew was rescued by the Belgenland, which proceeded on to its port of call in Philadelphia, where the master and crew of the Norwegian vessel were delivered and the libel was instituted.

In discussing the circumstances under which an American court should assert jurisdiction over a controversy among foreign parties arising on the high seas, the court noted that the principal of when an action occurs on the high seas, "between persons of different nationalities," it comes "within the domain of the general law of nations, or *communis juri*, are prima facie subjects of inquiry in any Court of Admiralty which first obtains jurisdiction of the rescued or offending ship at the solicitation in justice of the meritorious, or injured, parties."[34] The notion Justice Bradley was espousing in the *Belgenland* was far different from the facts of the instant case. There, he was acknowledging that all nations have a potential interest in collisions on the high seas, which are sovereign to none, and that it is appropriate for a United States court to take cognizance of a case between citizens of two different nations when it obtains personal jurisdiction over the rescued or offending ship. This ruling is based on the specific notion of *communis juris*; that is, that the law of the high seas governs and neither party has a greater claim than the other to having its particular nation judge the claim. Nothing in *The Belgenland* intimates that subject matter jurisdiction in admiralty should be

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[34] *Id.* at 362-63.

extended to the territorial waters of other nations to preside over collisions in those waters between vessels of that same foreign nation, where no American interest exists, and where a forum already exists for the resolution of that controversy by the courts and laws of that country.

The waters of Mexico's Exclusive Economic Zone are not synonymous with the "high seas."[35] Thus, the principles of *communis juris* relied upon in *The Belgenland* are inapplicable. Simply, the expectations of the parties in the instant case are quite different from that of the parties in *The Belgenland*. Two Mexican companies whose vessels collide in Mexican waters can and should, and, in fact, did initially file suit in Mexico.

The position of petitioner in this case is consistent with the principles previously espoused by this Court in both finding and declining jurisdiction. Where the interests of the United States in admiralty and maritime commerce are implicated, subject matter jurisdiction exists. That can reasonably be inferred from the Constitution's grant of jurisdiction to all cases arising under the laws of the United States or treaties made with other nations. Exercising subject matter jurisdiction over collisions in foreign waters and over non-resident foreign corporations with no offices in the United States, where no law of the United States or treaty indicates it, is an unwarranted extension of subject matter jurisdiction and poses adverse

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[35] *Humane Soc'y of the U. S. v. Clinton*, 236 F.3d 1320, 1322 (Fed. Cir. 2001).

consequences to United States interests abroad. In *Lauritzen*,[36] this Court, in giving a limited reading of the Jones Act, stated:

> In dealing with international commerce we cannot be unmindful of the necessity for mutual forebearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.[37]

Similarly, in a choice of forum selection clause case, the Supreme Court made the following strong statement about overreaching the scope of American law and policy:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts...We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved by our courts.[38]

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[36] *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

[37] *Id.* at 581-82.

[38] *M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

The plaintiff in this case, Protexa, chose to file suit in the United States, for several reasons. In addition to wanting to avoid the consequences of a Mexican Limitation of Liability fund, Protexa hoped to find a favorable haven in the Southern District of Texas, Galveston Division, in the form of Judge Samuel Kent, who has since been forced to resign his office. Regardless of the reasons, however, it is clear that Protexa was forum shopping, despite the forum in its own country that was more than adequate to resolve the issues of this case. By finding subject matter jurisdiction, the district court, and thereafter the Court of Appeals, both encouraged this type of behavior, sending a message to foreign countries and future litigants for the future; namely, that the United States considers all maritime disputes, regardless of location, nationality of parties, or absence of connection to the United States, to be within the subject matter jurisdiction of its courts. America can hardly complain if foreign courts apply the same approach and assume subject matter jurisdiction over collisions in American waters between American-owned-and-operated vessels. This is certainly a possible future consequence of such a broad reading of the grant of jurisdiction.

The Belgenland[39] decision also articulates another basis for subject matter jurisdiction in the event of collision or other vessel-related claims, which is the enforcement of maritime liens by *in rem* attachment.[40]

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[39] *The Belgenland*, 114 U.S. 355 (1885).

[40] *Id.* at 366, *citing The Jerusalem*, 13 F. Cas. 559 (C.C.D. Mass. 1814) (No. 7,293).

That is a completely different issue, insofar as it depends upon the vessel calling in a United States port (thus creating a direct link with the jurisdiction) and also relies upon enforcement of international treaties pertaining to the existence and enforcement of liens (which, again, corresponds to the language of Article 3, Section 2 about treaties). Under the present facts, *in rem* or *quasi in rem* jurisdiction over the ISLA AZTECA never came into play, as the vessel was not seized in any U.S. port.

Subject matter jurisdiction is a threshold issue for United States courts. Either it exists, and the court can proceed to evaluate whether jurisdiction should be accepted or declined for other reasons, or it does not, and the inquiry ends there. No case from this Court decisively controls this issue-that much was apparent to Judge Ellison in his written opinion, and, is implicit in the Fifth Circuit's opinion given the paucity of authority offered to support its result. This is an issue of major significance for the maritime commerce of the United States, and is squarely presented by these facts, making the issue ripe for resolution.

II. Alternatively, The Fifth Circuit Has Misapplied the Doctrine of Forum Non Conveniens to Permit a Case With no Connection to the United States to Be Tried in a United States District Court, Despite Reaching a Contrary Ruling on a Case with Virtually the Same Facts, and Has Departed So Far from the Accepted Course of Resolving Forum Non Conveniens Cases that Supervisory Authority Should be Granted by This Court.

The decision of the Fifth Circuit that no restrictions exist on maritime subject matter jurisdiction, if the claim arises on navigable water somewhere in the world, leads to an inevitable result. The role of gatekeeper in the federal courts for maritime claims from around the world falls to the individual federal district judge, who must undertake, if requested, a *forum non conveniens* analysis. Unfortunately, by delegating this responsibility to the district court, appellate review is made difficult, if not practically impossible, because of the abuse of discretion standard of review. Thus, the issue of subject matter jurisdiction, which is reviewed *de novo* at every stage of the proceedings, is converted into a one time review by the district court, which can only be reversed if the district judge abuses his discretion. This is somewhat mind boggling, since this Court formerly evaluated the issue of whether to retain jurisdiction at the same time and in the same manner as it considered whether subject matter jurisdiction existed in the first place.

This was nowhere more apparent than in the decision of *Canada Malting Co., Ltd.*[41]

In that pre-*forum non conveniens* era, this Court considered whether to decline jurisdiction over a suit between two Canadian corporations arising from a maritime collision that occurred on the Great Lakes. In *Canada Malting*,. the colliding vessels were registered under the laws of Canada, the officers and crew were all Canadian, the cargo was shipped under a Canadian bill of lading, and was being shipped from one Canadian port to another.[42] Thus, in many important respects, the facts are identical to the ISLA AZTECA/TOTONACA collision- with one major exception. The two Canadian vessels collided in a Great Lake between the United States and Canada, within the territorial waters of the United States. Thus, a traditional basis for subject matter jurisdiction existed, or at least a basis why the United States might concern itself with this case-namely, a collision of vessels in United States waters.

Nonetheless, this Court declined to exercise jurisdiction, when it might have done so on that one basis, finding that under the totality of the evidence, it was "difficult to conceive of a state of facts more clearly justifying the refusal of a District Court to retain jurisdiction in a cause between foreigners."[43] This is not idle language, and yet the Fifth Circuit

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[41] *Can. Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413 (1932).

[42] *Id.* at 423.

[43] *Id.* at 424.

failed to consider its implications. If the *Canada Malting* case is the most clear or extreme example of facts justifying the decline of jurisdiction, and that case involved at least one defined relationship to U.S. waters, then the application of *Canada Malting* to the instant case can logically lead to only two conclusions. First, any facts more attenuated than *Canada Malting* means that no subject matter jurisdiction could exist, because the facts of *Canada Malting* are the most extreme example of where jurisdiction exists and still must be declined. Alternately, if the existence or non-existence of a link to the United States has no effect on subject matter jurisdiction (which the Fifth Circuit clearly concluded), then *Canada Malting* and ISLA AZTECA/TOTONACA facts are squarely on point and the case should have been declined on the basis of *forum non conveniens*.

The Fifth Circuit seemed to understand the second point and specifically acknowledged that it "might well not reach the same conclusion under de novo review" of the *forum non conveniens* issue.[44] In this respect, it reinforced the opinion of Judge Ellison, who refused to reverse the original ruling of Judge Kent on the issue, but stated: "Given the facts of this case, this Court likely would have reached a different conclusion if it had been considering Defendant's motion to dismiss eighteen months ago."

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[44] *Perforaciones Exploracion y Produccion v. Maritimas Mexicanas, S.A. de C.V.*, No. 08-41021, 2009 U.S. App. LEXIS 26746, at *10 (5th Cir. December 9, 2009).

Both the Fifth Circuit panel and Judge Ellision knew that the *forum non conveniens* result was wrong, but refused to do anything about it—the *Canada Malting* precedent from this Court notwithstanding. So what happened? The Fifth Circuit panel felt obliged to give great deference to the original ruling on *forum non conveniens* by Judge Kent. As will be shown below, this was inappropriate, as Judge Kent's own analysis is defective on its face. Second, the Fifth Circuit bolstered its unwillingness to act, citing the alleged advanced stage of the proceedings; *i.e.*, that the case was too far advanced to correct the judicial error. If MarMex was forced to wait until the issue had become ripe, it would seem that its right to argue an inconvenient forum would not thereby be impaired. Apart from the fact that this was incorrect (the crux of the case was and remains the damage trial, which has not yet occurred), the Fifth Circuit had turned down a review of this same issue a year earlier on the grounds that it was premature.

Applying the two part analysis of *Piper Aircraft*,[45] Judge Kent acknowledged that an adequate forum existed in Mexico and that Mexican law would allow redress of the claims between the parties. Going on to the private and public factors, the district court wrote a two paragraph conclusory statement about private factors, with absolutely no citation to the briefs of the parties or to the facts themselves. Instead of undertaking an analysis of all the factors and attempting to balance them, the district court simply swept past the facts with conclusory statements like

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[45] *Piper Aircraft v. Reyno*, 454 U.S. 235, 255-56 (1981).

"many of the relevant documents have already been produced," "several witnesses amenable to this Court's jurisdiction," and "the location of the parties is equally inconvenient whether this matter is tried in Mexico or tried in Galveston." With respect, this constituted no private factor analysis at all, and thus represented an abuse of discretion for this reason alone. Similarly, Judge Kent's public factor analysis consisted, it appears, of deciding whether it was convenient for his docket to hear the case—an analysis of a mere nine lines.

The Fifth Circuit's affirmance of the district court on this analysis is curious. Although it is longer than Judge Kent's analysis of both the public and private interest factors, it similarly fails to address each of the detailed private and public factors as indicated by *Piper*. Significantly, before a court even reaches the public factor/private factor analysis, it should determine whether an adequate forum is available in the foreign country and then whether the law of the United States or that country should apply. The District Court found that Mexico was an adequate forum, but then erroneously determined that the case would be determined by U.S. law - despite lacking a basis to make such a conclusion - a result that was later overturned. Had the district court made the right decision on the issue of substantive law, it would have dismissed the case then and there, never reaching the private and public balancing factor test.[46]

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[46] *See, Piper Aircraft*, 454 U.S. 235.

Instead, the Fifth Circuit gave the district court the benefit of the doubt on this error and proceeded to consider the district court's private/public factor balancing analysis. Despite the absence of any detailed analysis by the lower court, and despite the abundance of factors militating against keeping the case in the United States, the Court of Appeals panel followed the path of least resistance and found no abuse of discretion.

What makes this determination untenable and demanding of correction is the fact that a separate panel of the Fifth Circuit, on a case with facts no more compelling than those presented here, reached an entirely opposite conclusion. Worse, the case originated from the same Judge Kent, who there found that his court presented a convenient forum. That decision,[47] involved a Mexican citizen who died working aboard the PRIDE MISSISSIPPI, a drilling vessel leased to PEMEX, the national oil company of Mexico. The accident occurred 47.18 nautical miles from Ciudad Del Carmen, offshore of the Eastern Coast of Mexico. Pemex controlled the well and provided a drilling crew to man the rig. Plaintiff was employed by a Mexican corporation contracted to PEMEX. Although the Mexican Ministry of Labor had already assumed jurisdiction of the accident and investigation, Plaintiff's family filed suit in the United States District Court for the Southern District of Texas. Judge Kent rejected the defendants' *forum non conveniens* challenge. After some procedural wrangling over expert credibility and integrity, the

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[47] *Saqui v. Pride Cent. Am., L.L.C.*, 595 F.3d 206 (5th Cir. 2010).

issue of forum *non conveniens* was renewed at the district court level, and, ultimately, a new District Judge who had replaced Kent by this time, granted the *forum non conveniens* motion. This result was sustained on appeal by the Fifth Circuit; again, on the basis that no abuse of discretion occurred.

The only real differences between *Saqui* and the present case are that: 1) only one party had voluntarily submitted to the jurisdiction of Mexican law in Saqui, whereas both parties initially did so in the instant case (which makes the instant case stronger than *Saqui* for a *forum non conveniens* dismissal); and 2) the district judge who replaced Judge Kent took the step of reversing his earlier ruling rather than deferring that responsibility to the Fifth Circuit, as Judge Ellison did in this case.

Abuse of discretion is only a standard. It is not a means for reviewing courts to avoid making correct and consistent rulings. Otherwise, the doctrine of *forum non conveniens* is no doctrine at all; it becomes merely a hodgepodge of factors, any one of which a district court is free to disregard or accord no weight. If that is true, the law in this area is merely what any individual district court says it is. Where two cases with the same *forum non conveniens* issues are decided differently a month apart by the same Court of Appeals and arise from bad decisions made by the same district judge (both in favor of retaining a case with no connections to the forum), and the only difference is that in one instance, the district judge who assumed the case corrected it, while the other did not, something is squarely out of joint at the Fifth Circuit.

When this was pointed out in an application for rehearing en banc, it was ignored, and not even addressed in the opinion denying rehearing. Instead, the original panel issued a brief opinion that rather petulantly offered up several ostensible connections to the United States that were totally absent from the district court opinion and were supplied in supplement briefs from Protexa. Included among this after-the-fact rationalization were the fact that the ISLA AZTECA allegedly called in a U.S. port years after the collision; that MarMex had filed suit once in the United States; that the ISLA AZTECA had been a U.S.-flagged vessel once in its career; that a U.S. citizen trained the ISLA AZTECA captain and had once been on the vessel six weeks before the allision. These fleeting contacts are so insubstantial as to be almost amusing, but for the fact that they were cited by the Fifth Circuit—although how these represent private or public factors was never explained.

By contrast, MarMex set forth to the District Court, and thereafter to the Fifth Circuit, the following key public and private interest factors, which compel dismissal on *forum non conveniens* grounds:

Private Factors

Under *Piper*, the private factors required to be considered are: relative ease of access to sources of proof, (2) availability of compulsory process for attendance of witnesses, (3) cost of obtaining attendance of witnesses, (4) possibility of viewing premises, (5) other practical problems that would make trial of a case easy, expeditious, and inexpensive, and (6) whether the plaintiff has sought to vex, harass or oppress the defendant. The district court simply

ignored one through five and focused on the fact that Protexa was not guilty of six. In fact, those first five factors all favored dismissal of the United States proceeding. MarMex had and continues to have more difficulty in obtaining access to sources of proof and witnesses than in Mexico, where it might have a court compel the attendance of both. For example, the TOTONACA was repaired in Mexico. While surveyors might have their own opinions of the cost of repairs, if MarMex wanted to discover more details of the actual costs of repair, it cannot do so from the United States.

Likewise, MarMex requested depositions of key witnesses who were employees of Protexa.[48] In response, counsel for Protexa advised that seven of the key witnesses (almost half of those requested) were no longer employed by Protexa and were located throughout Mexico.[49] These witnesses included the manager of repairs on the TOTONACA, personnel involved in the repairs, the Protexa Director of Maintenance, the TOTONACA superintendent and members of the TOTONACA crew.[50] Not one of these individuals was available for depositions or could be compelled to testify in the case by a United States court.

In addition, MarMex issued letters rogatory to fifteen subcontractors of Protexa to establish whether Protexa paid its subcontractors some $867,000 of the

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[48] 1S 562-68.

[49] *Id.*

[50] *Id.*

damages it is seeking. Not one letter rogatory was returned.[51] It goes without saying that MarMex would save substantial sums bringing damage witnesses to a trial in their home country of Mexico, rather than arranging for their travel to the United States. Simply, a case that is to be tried based on the testimony of Mexican residents and Mexican shipyard documents is inherently easier to try in Mexico and quite difficult to try in the United States, absent voluntary cooperation of witnesses, not under any compulsion to render assistance.

Public Factors

A review of the private factors, again, should have warranted dismissal without the need to look at the public factors.[52] If that were not enough, the district court should have looked to the public factors: namely, (1) administrative difficulties; (2) reasonableness of imposing jury duty; (3) holding the trial in view of those affected; and (4) local interest in having localized controversies decided at home. Clearly, two was not a factor, since it was a judge-tried case. However, the district court would have the following administrative difficulties: the determination of and application of appropriate Mexican law, the inability to enforce Letters Rogatory entered in the case, the use of translators, translated and untranslated documents, inability to compel attendance of key witnesses, extended trial time due to use of translators, and

[51] IS 1249-61 & IS 2122-2319.

[52] *Baris v. Sulpico Lines*, 932 F.2d 1540, 1550-51 (5th Cir. 1991)

potential witness travel issues at the time of trial. Three clearly favors dismissal, for holding a trial in view of all the difficulties, works a hardship on MarMex. Four also favors dismissal, as the Republic of Mexico has a demonstrable interest in having its citizens resolve controversies between themselves arising in Mexican waters take place in Mexican courts, and to avoid having its citizens summoned to other jurisdictions for trial testimony, and to see the correct application of its own substantive law to its own citizens. Neither the district court nor Protexa could dispute this—rather, they ignored it altogether or simply said it did not matter.

In the end, the issue of *forum non conveniens* was not close at all. The reasons for dismissal were plentiful and substantial. By contrast, the reasons set forth by the district court for sustaining jurisdiction were slender, and, in the case of the substantive law to be applied, completely wrong. In *Veba-Chemie*,[53] the Fifth Circuit upheld a conditional dismissal, declining to exercise subject matter jurisdiction on *forum non conveniens* grounds where the dispute was between foreign nationals, whose vessels collided on the high seas and the sole relevant contact with the United States was the presence of the defendant's vessel in a United States port over a year following the collision. That contact was more substantial than the rather embarrassing "contacts" cited by the Fifth Circuit in its denial of rehearing: that the ISLA AZTECA was previously owned by a U.S. company, that a U.S. citizen once trained the captain of the vessel, or that

[53] *Veba-Chemie AG v. M/V GETAFIX*, 711 F.2d 1243 (5th Cir. 1983).

third parties who were operating out of the United States inspected the repairs to the ISLA AZTECA. None of the facts cited by the Fifth Circuit amounted to any type of contact that related in any way to MarMex's operation of the vessel, the collision, or MarMex's operations in general.

The foregoing discussion certainly explains why the Fifth Circuit reached an incorrect and unfair result. This Court should intervene to correct this bad result because 1) it is plainly at odds with this Court's decision in *Piper;* 2) it represents bad precedent for the exercise of discretion by district courts in the future *forum non conveniens* cases; 3) suggests wrongly that disputes quite clearly have no connection with the United States court system can avoid dismissal on the whim of the district court – a clear encouragement for forum shopping; and 4) Judge Kent's deliberate disregard of established precedent by failing to apply all of the *forum non conveniens* factors to the facts, and the Fifth Circuit's failure to correct it, despite having reached an entirely different result in *Saqui*, were so egregious as to require this Court to exercise its supervisory authority.

CONCLUSION

MarMex, a Mexican corporation, had no reasonable expectations that it would ever be hailed into a Texas federal court by virtue of operating a Mexican-flagged vessel in the Bay of Campeche, while working for a Mexican oil company, and with no discernible ties to the United States. Yet, somehow, it was, through an expansive unjustified extension of admiralty subject matter jurisdiction and a thoroughly mangled *forum non conveniens* analysis. As precedent, this decision

can only serve to encourage forum-shopping within the United States, and as an incentive for foreign courts to employ the same logic to force unhappy United States litigants into admiralty courts in corners of the world with no connection to the casualty. The maritime law of the United States neither contemplates nor countenances such a result, and this Court is urged to accept certiorari and draw the bright line on admiralty subject matter jurisdiction that is so clearly needed.